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Kennard, John H.

Argument, with
statement of facts.



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Book .1134

ARGUMENT, WITH STATEMENT OF FACTS

SWORN TO, AND CITATIONS FROM THE

CONSTITUTION AND LAWS OF LOUISIANA,

TO SHOW THAT THE TEMPORARY AND PERMANENT ORGANIZATION OF

THE HOUSE OF REPRESENTATIVES

OF THE STATE OF LOUISIANA,

ON THE 4TH OF JANUARY, 1875, UNDER WHICH ORGANIZATION

L. A. WILTZ,

REPRESENTING THE DEMOCRATIC CONSERVATIVE PARTY, WAS LAWFULLY ELECTED
TEMPORARY AND PERMANENT SPEAKER, WERE IN STRICT
ACCORDANCE WITH LAW AND PRECEDENT.

John H. Kennard
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STATEMENT OF FACTS AND LAW.

*To the Honorable Charles Foster, William Walter Phelps,
and Clarkson N. Potter, Congressional Committee on
Louisiana Affairs, Sitting in New Orleans:*

I. AS TO THE DEMOCRATIC-CONSERVATIVE ORGANIZATION.

The total number of Representatives to which the people of Louisiana were entitled at this session was one hundred and eleven (111). The Returning Board, prior to the 4th of January, 1875, had furnished the Secretary of State with a list of one hundred and six (106) members upon whose election said Board had passed, of which number fifty-four (54) were supposed to be Republicans, and fifty-two (52) Conservatives and Democrats.

At twelve o'clock on the 4th day of January, 1875, the day prescribed by law for the meeting of the General Assembly, the House being assembled, William Vigers, Clerk of the preceding House of Representatives, whose term of office had expired on the 4th of November, 1874, proceeded to call the roll, under the forty-fourth section of Act No. 98, approved November 20th, 1872, which section declares:

“That it shall be the duty of the Secretary of State to transmit to the Clerk of the House of Representatives, and the Secretary of the Senate of the last General As-

sembly, a list of the names of such persons as, according to the returns, shall have been elected to either branch of the General Assembly; and it shall be the duty of the said Clerk and Secretary to place the names of the Representatives and Senators elect so furnished upon the roll of the Senate and of the House respectively; and those Representatives and Senators whose names are so placed by the Clerk and Secretary respectively, in accordance with the foregoing provisions, and no other, shall be competent to organize the House of Representatives or Senate. Nothing in this Act shall be construed to conflict with *Article thirty-four* of the Constitution of the State."

Article 34 of the Constitution provides that each house of the General Assembly shall judge of the qualifications, elections and *returns* of its members; but a contested election shall be determined in such manner as may be prescribed by law.

Article 33 of the Constitution provides that not less than a majority of members of each house of the General Assembly shall form a quorum to transact business; but a smaller number may adjourn from day to day, and shall have full power to compel the attendance of absent members.

Article 20 of the Constitution provides that each parish in the State shall be entitled to at least one Representative.

Article 36 of the Constitution provides that each house of the General Assembly shall keep and publish weekly a journal of its proceedings, and the yeas and nays of the

members on any question, at the request of any two of them, shall be entered on the journal.

After the completion of the roll-call by William Vigers, Clerk of the former House, as provided by Section forty-four, above recited, L. A. Wiltz was nominated as temporary Chairman by a member, and was, upon a *viva voce* vote, declared elected temporary Speaker, whereupon he took the chair, and announced himself temporary Speaker of the House of Representatives, and as such took his oath of office before Judge Houston, and also had said oath administered to him by a member. He thereupon administered the oaths to the members of the House. He then declared the functions of the former Clerk, Vigers, at an end. A Clerk was then, on motion, nominated and elected. A Sergeant-at-Arms and assistants were also elected.

During this temporary organization, upon motion put and adopted, the five members whose elections the Returning Board had not promulgated and had referred to the House, were admitted as members and sworn in. Thereafter L. A. Wiltz was nominated as permanent Speaker. The roll was called, and Wiltz and Hahn being in nomination, Wiltz received 55 votes. Hahn 2, and 1 blank. Fifty-six being a majority and legal quorum of the whole number, one hundred and eleven, to which the House was entitled, he was thereupon declared duly elected permanent Speaker, and was sworn in and then administered the oath to the members (by fours), including Michael Hahn, Thomas Baker, Murrell and

Drury, Republicans. A Committee on Credentials was then appointed, of which Hahn and Thomas were appointed members and accepted, and withdrew with the Committee. Upon the return to the House of said Committee, Hahn made known that he would make a minority report.

About this time, resistance being made to the Sergeant-at-arms of the House, and there being great danger of violence and bloodshed, the force of the Sergeants-at-arms, consisting of only some ten men, the State House being crowded on the inside and outside with Metropolitan Police and other unruly persons, said Police, on the outside being supported by a large array of United States soldiers, the Speaker, upon motion of Dupre, a member of the House, put and carried, requested General De Trobriand, who *had previously entered the State House, accompanied by some United States troops, without the knowledge or request of the Speaker*, to speak a few words to the persons in the lobby, the Speaker expressing the opinion that the General's remonstrance would prevent a riot, which was imminent. The General complied with the request, and without the use of any force, restored comparative quiet in the lobby. No other intervention by the United States authorities *was asked for or obtained*. This request was made, as above stated, after the General and some soldiers had entered the room.

About an hour after this, order being *fully restored*, General De Trobriand returned, and informed the Speaker that he had been ordered by Governor Kellogg

to replace Vigers as Clerk, and to eject the five members above referred to, upon whose cases the Returning Board had failed to report, and desired to know whether his orders would be complied with without the use of force. The Speaker replied that he was the lawful Speaker of the House of Representatives of the State of Louisiana, and would obey no order from Governor Kellogg, or any other source, unless compelled so to do by actual overpowering force, whereupon the General retired and soon returned with soldiers and requested the Speaker to point out the members indicated in his order from Kellogg for ejection, the General not knowing them personally. This request was also promptly refused; whereupon General Campbell and T. C. Anderson, the former General of Kellogg's militia, by which he was surrounded in and out of the State House, the latter a member of the Wells Returning Board, neither being members of the House, were called upon, and pointed out the desired members, who were thereupon seized, each by United States soldiers, with guns and fixed bayonets, and were forced out of the State House against their oft repeated protests.

Immediately upon this action by the Military Authorities of the United States, the Speaker requested the Conservative members to retire with him, which was done without exception. Genl. De Trobriand then ordered Mr. Vigers to call the roll, whereupon Speaker Wiltz reiterated his refusal to allow him to make such call, Vigers persisting, Wiltz had him forcibly ejected by his

Sergeant-at-arms. During all of these proceedings, the Speaker reiterated his protests and refusals to submit to any interference, unless compelled by overwhelming force. Such force was used by the United States Military Authorities, and to it alone he yielded.

II. AS TO THE PRETENDED REPUBLICAN ORGANIZATION.

After the withdrawal of Wiltz and the Conservative members, Vigers was restored to the position of Clerk. by General De Trobriand, Hahn was elected by acclamation Speaker, and administered the oath to the members in groups of four. Immediately thereafter, a resolution was adopted, seating four persons from the parishes turned over to the legislature by the Returning Board for decision. The oath was administered to them, an election for Clerk was then proceeded with; at which Vigers was declared elected.

Upon the calling of the roll, for the election of permanent Speaker, only fifty answers were made. Both Hahn and Vigers testified on the 6th of January, 1875, before your Honorable Committee, that this was the number who answered the roll call when the vote was cast for Speaker, but claimed that two names that had answered upon a previous call of the roll, which call was stopped by Wiltz before he retired, were added to make the fifty-two. *This is the largest number claimed by the two witnesses above mentioned* when under oath before the Committee. Two of this number as before said, were of those who retired with Wiltz, and whose affidavits accompany this statement,

showing that they were not present when Vigers called the roll *de novo*. But even if present and properly added they would not have completed a quorum, as under article 33 of the Constitution, not less than a majority of the *members elect* shall form a quorum. The number elected was one hundred and eleven, of which fifty-six is a quorum.

THE LAW OF THE CASE.

The only measure of the authority of an outgoing Legislature, as to an incoming Legislature, must of necessity be the Constitution of the State.

The House of Representatives which assembled January 4th, 1875, in the State House of Louisiana, was as free from any regulation imposed by the preceding Legislature, as was the first House that assembled in the State, unless a distinct provision can be found in the Constitution authorizing such regulation.

Does the Constitution of Louisiana of 1868 contain any clause which warranted the enactment of Section 44, Act No. 98, approved November 20th, 1872?

The language of this Section is quoted in the above statement of facts and law. What is the extent of the Clerk's powers under this law?

“And it shall be the duty of the said Clerk and Secretary to place the names of the Representatives and Senators elect so furnished upon the roll of the House and Senate respectively.”

There is *no other portion* of the Section which relates to

the duties or powers of the Clerk. His duties are *strictly limited* and entirely *ministerial*.

He calls the roll merely by *the grace* of the House, in accordance with custom, and the moment he completes the roll call his functions are ended. The *manner* of organization then belongs exclusively to the House.

But it is urged that Section 44 of this Act prescribes that *no others*, than those thus placed on the roll by the Clerk, are competent to organize the House.

How can the rights of the House which met January 4th, 1875, be *less* than that which adjourned March 1st, 1874, unless the House of 1874 was given power in the Constitution to abridge the rights and privileges of its successors?

Not a word can be found in the Constitution even looking towards such an authorization. On the contrary, Article 34, quoted in the statement of facts and law, specially provides that *each* house of the General Assembly shall judge of the qualifications, elections and returns of its members.

The plain language of this article shows that the convention which formed the Constitution was careful to prohibit the Senate and Executive from any interference with the qualifications, elections and returns of the members of the House. The specific Constitutional provision as to contesting seats, following immediately the provision in Article 34, that "*each* House of the General Assembly shall judge of the qualifications, elections and returns of its members," excludes the idea that either House of

the General Assembly can be controlled in deciding upon the qualifications, elections and returns of its members by a law which requires the approval of the Senate and Executive. This provision was intended to secure the independence of the House from the influence of the Senate and Executive, and is almost a duplicate of the provisions contained in all of the State Constitutions, and is in the exact words of the first clause of the fifth Section of the first Article of the Constitution of the United States.

How many are a quorum? Article 33 of the Constitution declares "that not less than a majority of the members of each house of the General Assembly shall form a quorum to transact business, but a smaller number may adjourn from day to day, and shall have full power to compel the attendance of absent members."

The 20th Article of the Constitution provides "that *each* parish shall be entitled to at least one Representative."

Construing the thirty-third Article, which requires a majority of the members of each house to form a quorum, with Article 20, which requires that *each* parish shall be entitled to at least *one* Representative, and Article 46, which requires returns of *all* elections for members of the General Assembly to be made, the conclusion is inevitable that a legal quorum, under the Constitution, must be a majority of the whole number of Representatives to which the State is entitled, to-wit: Fifty-six—a majority of one hundred and eleven.

To construe Section 44 of Act of 1872, as authorizing

a quorum to be constituted of a majority of the members that may be returned by the Returning Board, is to annul by statute the constitutional provisions contained in Articles 20, 33 and 46. Such a construction leads to a *reductio ad absurdum*. The Returning Board, who referred in this election the claims of five Representatives, representing *four* parishes, to the Legislature for decision, had, under the law, the same right to have referred fifty or one hundred; or one hundred and ten, leaving one man to organize the House.

It is well settled that when the Returning Board had dissolved, referring the decision as to the claims of certain parties to seats, to the House, its powers in the premises were ended.

12 Barbour's Reports (N. Y. Supreme Court), 217, The People, *ex rel.* Alexander H. Bailey, vs. The Supervisors of Greene.

To deny the right of the House to decide upon the *prima facie* rights of claimants to seats, would be to deny, altogether, under certain circumstances, the right to organize, and would give the Returning Board absolute power to disfranchise the people of the whole State.

A precedent for the mode of the temporary organization adopted by the House of Representatives of the State of Louisiana on the 4th of January, 1875, was established during the first session of the twenty-sixth Congress of the United States.

See Congressional Globe, volume 8, from pages 1 to 21 inclusive.

The House of Representatives assembled on Wednesday, December 22nd, 1839. On the 5th of December, 1839, being still without a temporary organization, Mr. Adams (p. 19) arose and said: "I am under the necessity of appealing to you, fellow-citizens, to set aside the decisions of the Clerk, and act for yourselves. I propose that the House shall act in whatever form it pleases; it may choose a temporary Clerk or not, as it is thinks proper. I put this question to the majority of the House. It is their duty to organize it, and therefore they ought, as a preliminary step, to put themselves in such a situation that no decision of the Clerk can force upon the House an organization in the manner he dictates. The House may set aside the Clerk, but is not forced to obey his despotical dictates." The Clerk had refused, and was refusing, to call the names of the members from New Jersey, their names not appearing on the roll, which he had made up in accordance with past usage. He had omitted to place them on the roll because two sets of claimants appeared for the seats. Mr. Rhett (p. 19) then offered a resolution that Louis Williams, the oldest member of the House, be appointed Chairman of this meeting until the House organize. Mr. Williams declining to take the chair, Mr. Rhett (p. 20) "then varied his motion, so as to call Mr. Adams to the chair instead of Mr. Williams, and putting *himself* the question to the meeting, it was carried, and Mr. Adams took the chair." The temporary organization of the House was thus effected.

During this temporary organization, Mr. Duncan (p.

26) observed "that he understood yesterday, that after the appointment of a chairman the rules of the last House of Representatives were adopted for the governance of this House, for the time being. One of these rules required that the yeas and nays should be called alphabetically. Now he wished to know of the Chair, if the yeas and nays would be called if demanded, and how. The Chair stated that the rule *did not apply*, because the organization of the House was not completed. The yeas and nays therefore could not be called."

Thereafter the question arose on the second branch of Mr. Rhett's resolution in the following words, "and after the names of such members are called, and *before* a Speaker is elected, they shall, provided there be a quorum of such present, then hear and adjudge upon the election returns, and qualifications, of all claimants (Messrs. Ingersoll and Naylor excepted) to the seats contested on this floor, which motion was carried, yeas, 138, nays, 92." During the progress of this debate (p. 53). Mr. Wise said : " In order to illustrate the position of my colleague, I will state that the Chair decides that he cannot put the question on his appeal while the election is going on. Now, from that very decision my colleague has a right to appeal. The Chair said, the motion of the gentlemen could be offered when a Speaker was chosen, but that he could not take an appeal when the House was in the act of electing a Speaker. Mr. Wise then said : ' Here is a decision that an appeal cannot be taken. It is not competent for my colleague to take an appeal from that decision.' The Chair, ' Certainly not, Sir.' "

Under the Constitution of Louisiana, before quoted Article 36, no call for yeas and nays is allowable, even in permanent organization, unless demanded by *two* members, and there is no constitutional right of appeal from the decision of the Chair.

In the organization of the House resulting in the election of Mr. Wiltz as Speaker, no two members called for yeas and nays, and no appeal of any kind was taken from the ruling of Mr. Wiltz, either as temporary or permanent Speaker.

The temporary organization by which Mr. Wiltz was called to the Chair, was made when there were 102 members present, an ample constitutional quorum. There was a vote in his favor, and no votes against him. He thus became temporary Chairman, without any opposition of a body composed of 102 members.

The statute of 1872 cannot be urged against this, because the persons present were the same persons named in the statute, having been returned by the Returning Board.

The next step was equally legal. Five members, representing four parishes, had been elected, and the returns showed that they had been elected. Under Article 46 the Returning Board should have returned their names to the Secretary of State, and he to the Clerk, for the article specifically requires the returns of all elections to be so made.

No one was contesting their seats. Their *prima facie* title was clearly without dispute.

The seating in no manner affected the right of after-contestation. Mr. Wiltz and his political friends in the House would have violated Article 46 of the Constitution if they had not admitted them to a voice in the election of a permanent Speaker.

They were therefore properly admitted, care being taken to reserve the right of any one who chose to contest their seats.

The body then proceeded to elect a permanent Speaker, and upon this vote an ample quorum was present, and more than a legal quorum voted, there being fifty-five votes for Wiltz and three for opposition Republican candidates.

Mr. Wiltz thus became legal permanent Speaker.

A Committee on Credentials was then appointed, of which Michael Hahn was a member, and he retired with the Committee. The Committee returned, after some delay, and reported in favor of admitting sundry other members, and Mr. Hahn reserved his right of making a minority report. During the whole proceedings there were no appeals taken from the rulings of either the temporary Chairman or permanent Speaker.

Thus was organized the House of Representatives of Louisiana, the fourth day of January, 1875, in strict accordance with the Constitution of the State and precedent. This organization was destroyed by the interference of Federal troops, to whom the Legislature refused to submit until overpowered and compelled by actual force.

Whether this armed intervention is *to stand as a prece-*

dent becomes a vital question to every State in the Union.

JOHN H. KENNARD,

Of Counsel for Committee of Seventy before Congressional Committee.

L. A. Wiltz, being duly sworn, deposes and says, that he has carefully read and critically examined the facts and figures contained in the above brief, as to the organization of the House of Representatives of the State of Louisiana, on the 4th day of January, 1875, and of his own knowledge knows them to be true.

LOUIS A. WILTZ.

Subscribed and sworn to before me on
this 11th of January, A. D. 1875.

J. G. EUSTIS,

United States Commissioner for the District of Louisiana.

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